(7)

No. 89-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T. L. JAMES & COMPANY, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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I.

THE GOVERNMENT ABANDONED THE POSITION IT TOOK IN THE FIFTH CIRCUIT IN ORDER TO PROTECT A JUDGMENT IT LATER OBTAINED IN THE FIRST CIRCUIT

In considering the brief for the United States, it must be remembered that it is the prevailing party in *U.S. v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I. 1989), aff'd., 910 F.2d 24 (1st Cir. 1990), petition for cert. pending, No. 90-816. In that case, the district court adopted the government's theories of direct and indirect CERCLA liability. It found Kayser-Roth Corporation directly liable for clean-up costs at its subsidiary's facility by virtue of its active

participation in its subsidiary's activities. It also found Kayser-Roth indirectly liable under a federal common law test. The First Circuit affirmed the direct liability finding and found it unnecessary to review the district court's indirect liability analysis.

The government now opposes Joslyn's petition for *certiorari* seeking review of the Fifth Circuit's refusal to apply the theories of direct and indirect CERCLA liability adopted in *Kayser-Roth*. It does so more as a party protecting its victory than as a national representative promoting a proper development of federal law.

Before the First Circuit decided *Kayser-Roth*, the government filed an *amicus* brief supporting Joslyn in the Fifth Circuit. It argued Joslyn's contribution claim against James Company should be remanded because the district court had not applied the proper standards for direct and indirect CERCLA liability.

The government proposed the following direct liability standard in the Fifth Circuit:

> The United States urges this Court to establish a standard of direct liability under CERCLA based on the decisions in *Shore Realty* and *NEPACCO*. That standard would provide that a person is directly liable under §107 of CERCLA, 42 U.S.C. 9607, where that person exercised authority for a company's hazardous substance operations by participating in (a) operating a hazardous substance facility or vessel; or (b) arranging for the disposal or treatment of hazardous substances; or (c) accepting hazardous substances for transportation. Under this standard, a parent corporation is directly liable when its officers, directors, or employees, in the ordinary course of their activities in these roles, participates in the hazardous substance disposal activities just enumerated.

C.A. Amicus Br. for U.S., 22-23.

After the First Circuit decided *Kayser-Roth* in its favor (and after Kayser-Roth Corporation filed its petition for *certiorari*), the government labors to persuade this Court that the Fifth Circuit decision does not conflict with *Kayser-Roth*, *Shore Realty* and *NEPACCO*. While it admits the Fifth Circuit failed to "discuss", "directly acknowledge," or "consider" its direct liability theory, U.S. Br., 10, the government somehow claims the court did not reject it. U.S. Br., 11. But the Fifth Circuit did not equivocate or limit its ruling to the facts: It expressly declined to follow *Shore Realty*. See Joslyn's Pet. App. 5a.

The government now claims the Fifth Circuit rejected *Joslyn's* theory, not the one it advocated (although its footnote 9 concedes "statements in Joslyn's court of appeals brief might be interpreted to coincide with the government's theory. . ."). Defeat is often an orphan, but "who proposed what theory" is less important than the court's decision. It is enough that the Fifth Circuit applied no direct liability theory.

Joslyn agrees with the position the government took in the Fifth Circuit, i.e., that Joslyn was entitled to have its case decided under the direct liability standard adopted in *Shore Realty*, *NEPACCO* and *Kayser-Roth*. Joslyn submits a trier of fact could reasonably find James Company liable under that standard. Lincoln's wood treatment plant was undeniably a "hazardous substance operation." James Company exercised authority over Lincoln's operations. While its officers, directors and employees may not have been handling the chemicals, they were involved extensively in Lincoln's operations. See Joslyn's petition, 2-4.

The government's brief to this Court also dances away from the position it took on indirect CERCLA liability in the Fifth Circuit. The government urged that court to apply

a federal common law standard for indirect CERCLA liability in which a subsidiary's corporate veil would be pierced under the following circumstances:

> A. The financial resources of the subsidiary are not adequate to pay the CERCLA response cost for which it is liable under §107 or the subsidiary is otherwise not available to pay those costs (or the subsidiary does not have the financial resources to perform in response to EPA's clean-up orders issued under or an injunction secured pursuant to §106(a) of CERCLA); *and*
>
> B. The subsidiary performed a function of economic importance to the enterprise of a parent, *or* the parent participates directly in the management of the subsidiary.

C.A. Amicus Br. for the U.S., 47.

The government acknowledges the Fifth Circuit did not apply this test, but still opposes review in this Court. First, it argues there is no conflict among the circuits as to the extent to which corporate forms may be disregarded under CERCLA. But the First Circuit in *Town of Brookline v. Gorsuch*, 667 F.2d 215 (1st Cir. 1981), disregarded separate corporate forms to enforce the federal environmental policy embodied in the Clean Air Act, without plodding through the "heavily fact specific" state law analysis the lower courts employed here. We cannot perceive why the Clean Air Act and CERCLA should have different standards. The government's brief provides no explanation.

Second, the government suggests federal and state veil-piercing rules are based on the same broad principles, but this ignores one critical difference. The federal analysis applied in *Town of Brookline* looks closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form. The Fifth Cir-

cuit's *Jon-T* analysis gave no weight to CERCLA's purpose of shifting clean-up costs to persons who benefitted from hazardous waste disposal.

Third, the government opposes *certiorari* on the ground the indirect liability theory may have "limited practical importance" because the parent which had its subsidiary's corporate identity disregarded would probably also be directly liable for its own participation in the operation of the subsidiary's facility.

The government's dismissal of indirect liability as unimportant rings hollow. This Court's determination of the circumstances in which separate corporations are treated as one in CERCLA cases will also determine who will pay millions (if not billions) of dollars in clean-up costs at sites throughout the United States. The government's discussion of the proper veil-piercing standard under federal common law covered 24 pages of its *amicus* brief to the Fifth Circuit.

Moreover, the indirect liability test the government proposed in its Fifth Circuit brief would not hold a parent liable solely for its participation in the subsidiary's management. It also imposes liability on the parent if the subsidiary is unable to respond to its CERCLA liability and had performed a function of economic performance to the parent. A trier of fact could reasonably find James Company liable under this test. Lincoln is unavailable to respond to its CERCLA liability, and James Company profited from Lincoln's disposal of hazardous waste.

A parent corporation may also be indirectly liable because of its participation in the management of its impecunious or dissolved subsidiary under the government test. But the possibility this prong of the indirect theory overlaps with direct liability does not support the argument that this Court should not review this case. The

Court may find that disregarding the subsidiary's corporate form under a federal common law analysis makes the most sense in CERCLA cases. It may choose to accept, reject or refine the proposed theories of indirect liability, direct liability, or both.

CONCLUSION

CERCLA should have the same meaning throughout the nation. The conflict between the Fifth Circuit's interpretation of CERCLA liability and that adopted in the First, Second and Eighth Circuits cannot be papered over. This Court should grant Joslyn's petition.

Respectfully submitted,

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